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August 2, 2012

VIA FAX

Ms. Bridget Bohac
Chief Clerk (MC-105)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Whitney L. Swift
TEL +1 512.322.2672
FAX +1 512.322.8339
whitney.swift@bakerbotts.com

Re: Appeal of Negative Use Determination
Tax Relief for Pollution Control Property Program
Application No. 12271; Midlothian Energy Plant, Ellis County

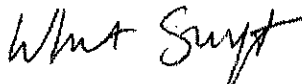
Dear Ms. Bohac:

Please find enclosed *Midlothian Energy Limited Partnership's Appeal of the Executive Director's Negative Use Determination* for the above-referenced application.

Midlothian Energy Limited Partnership hopes that an agreed resolution of the dispute regarding the appropriate tax relief for heat recovery steam generators ("HRSGs") can be achieved, and requests a meeting with the Executive Director's staff to discuss the treatment of HRSGs under Chapter 17.

If you have any questions concerning this filing, please do not hesitate to contact me at the number above.

Sincerely,



Whitney L. Swift

Enclosure

cc: Sydney Free
Daniel Long, TCEQ Environmental Law Division

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2012 AUG -2 PM 4:23
CHIEF CLERKS OFFICE

APPEAL OF THE EXECUTIVE
DIRECTOR'S USE DETERMINATION
ISSUED TO MIDLOTHIAN ENERGY
LIMITED PARTNERSHIP

APPLICATION NUMBER 12271;

TRACKING NUMBER 08-RC-MEL 2008

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BEFORE THE TEXAS COMMISSION

ON

ENVIRONMENTAL QUALITY

CHIEF CLERK'S OFFICE

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**MIDLOTHIAN ENERGY LIMITED PARTNERSHIP'S APPEAL OF THE EXECUTIVE
DIRECTOR'S NEGATIVE USE DETERMINATION**

TO THE HONORABLE COMMISSIONERS AND GENERAL COUNSEL OF THE TEXAS
COMMISSION ON ENVIRONMENTAL QUALITY:

Midlothian Energy Limited Partnership ("Midlothian Energy") submits this Appeal of the Executive Director's negative use determination issued to Midlothian Energy under the Texas Commission on Environmental Quality's ("TCEQ's") Tax Relief for Pollution Control Property Program. For the reasons set forth below, Midlothian Energy respectfully requests that the Commission overturn the Executive Director's ("ED's") negative use determination for the six heat recovery steam generators ("HRSGs") and 12 enhanced steam turbines installed at the Midlothian Energy Plant and grant a positive use determination.

I. Introduction

Midlothian Energy filed an "Application for Use Determination for Pollution Control Property" on April 25, 2008, seeking a partial positive use determination for six HRSGs and 12 enhanced steam turbines that had been installed at the Midlothian Energy Plant located in Ellis County ("the Application"). The Application sought a Tier IV partial use determination for the HRSGs and the steam turbines, which had been installed at the plant in 2001 and 2002.

On April 29, 2008, the ED sent a letter to Midlothian Energy's designated contact stating that the Application had been declared administratively complete. The ED assigned the Application number 07-12271 and tracking number 08-RC-MEL 208. The ED notified the Ellis County Appraisal District of the Application. On August 27, 2008, Midlothian Energy

supplemented the Application with an updated cost analysis seeking a 100% positive use determination. The Executive Director failed to act on the Application, however, until 2012.¹ On July 10, 2012, the Executive Director issued a "Notice of Negative Use Determination" for the HRSGs and the steam turbines in the Application.

II. This Appeal is Timely

Under 30 TEX. ADMIN. CODE ("TAC") § 17.25(b), an appeal of a use determination made by the ED must be filed within 20 days after the receipt of the determination letter. The ED's Notice of Negative Use Determination for the Application is dated July 10, 2012. In accordance with 30 TAC § 17.25(b), Midlothian Energy is presumed to have been notified on the third regular business day after the date the notice of the ED's action is mailed by first class mail; thus, Midlothian Energy is presumed to have been notified of the negative use determination on July 13, 2012. An appeal of the ED's negative use determination for the Application must be filed with the Office of the Chief Clerk on or before August 2, 2012.

III. Required Elements of the Appeal

A. Person Filing the Appeal

Ms. Sydney Free
Midlothian Energy Limited Partnership
Midlothian Energy Plant
4601 Brookhollow Drive
Midlothian, Texas 76065
Phone: (713) 636-1608

¹ Under 30 TAC § 17.12, *Application Review Schedule*, the ED was required to complete the technical review of the Application (submitted as a Tier IV application) within 30 days of receipt of the required application materials. *See* 30 TAC § 17.12(3) (effective February 7, 2008); *see also* 30 TAC § 17.12(3) (current). Even if the Commission issues a positive use determination for the Midlothian Energy Plant HRSG/combustion turbine installation in response to this appeal, the delay in the ED's ruling on the Application will have prejudiced Midlothian Energy by depriving Midlothian Energy of the full tax reduction benefit flowing from the determination from 2009 to present -- particularly when compared to other applicants who filed applications for use determinations for similar HRSG installations in early 2008 and were granted full positive use determinations by the ED in May 2008. The Ellis County Appraisal District has granted Midlothian Energy partial tax relief for the HRSGs in the Application prior to the ED's determination, but Midlothian Energy has not received the full tax relief granted to those HRSG owners with full positive use determinations.

B. Entity to which the Use Determination was Issued

Midlothian Energy Limited Partnership
Midlothian Energy
5000 V.V. Jones Rd
Venus, Texas 76084

c/o Mr. Greg Odell
Agent
Ryan, Inc.
12th Floor LB 72
13155 Noel Rd
Dallas, Texas 75240

Please direct all further correspondence and filings regarding this matter to Ms. Sydney Free using the contact information provided above for *Person Filing the Appeal*.

C. Application Number for the Use Determination and Copy of the Negative Use Determination

Application No. 12271; Tracking No. 08-RC-MEL 2008. A copy of the Notice of Negative Use Determination is attached as Exhibit A.

D. Appraisal District Information

Ellis County Appraisal District
P.O. Box 878
Waxahachie, Texas 75165

E. Request for Commission Consideration of the ED's Use Determination

Midlothian Energy requests that the Commission overturn the ED's negative use determination and grant a positive use determination for the HRSGs and enhanced steam turbines installed at the Midlothian Energy Plant that are the subject of Application No. 12271.

F. Basis for the Appeal

The ED offered the following explanation in issuing its negative use determination for Application No. 12271: "Heat recovery steam generators and steam turbines are used solely for production; therefore, are not eligible for a positive use determination." The ED is not correct, and the position that the ED has now taken in issuing the negative use determination is inconsistent with past agency practice and the statute and rules that implement the TCEQ's Tax Relief for Pollution Control Property Program.

1. Regulatory Exclusions

TCEQ rules establish the following four categories of property that are not eligible for a positive use determination:

(1) property is not entitled to an exemption from taxation:

(A) solely on the basis that the property is used to manufacture or produce a product or provide a service that prevents, monitors, controls, or reduces air, water, or land pollution;

(B) if the property is used, constructed, acquired or installed wholly to produce a good or provide a service;

(C) if the property is not wholly or partly used, constructed, acquired or installed to meet or exceed law, rule, or regulation adopted by any environmental protection agency of the United States, Texas, or a political subdivision of Texas for the prevention, monitoring, control, or reduction of air, water, or land pollution; or

(D) if the environmental benefit is derived from the use or characteristics of the good or service produced or provided;

(2) property that is used for residential purposes, or for recreational, park, or scenic uses as defined by Texas Tax Code, §23.81;

(3) motor vehicles; and

(4) property that was subject to a tax abatement agreement executed before January 1, 1994. However, property acquired, constructed, or installed after expiration of a tax abatement agreement could be eligible for a positive use determination.

30 TAC § 17.6(1). The ED's Notice of Negative Use Determination indicates that the ED concluded that the Midlothian Energy Plant HRSGs and combustion turbines are ineligible for any exemption from taxation because they fall into category (1)(B) -- "property installed wholly to produce a good or provide a service." As explained below, the Midlothian HRSGs and enhanced steam turbines are not installed wholly to produce a marketable product, and their indisputable air pollution benefit merits a positive use determination from the Commission.

2. The Midlothian Energy Plant HRSG/Steam Turbine Installations

HRSG/enhanced steam turbine installations like those installed at the Midlothian Energy Plant produce significant environmental benefits. HRSGs use waste heat to reduce emissions of oxides of nitrogen ("NO_x"), sulfur dioxide ("SO₂") and other pollutants from power

generation activities on a pound per kilowatt-hour basis. That fact cannot be reasonably disputed.

The six Midlothian Energy Plant HRSG/steam turbine installations (each consisting of one HRSG and two enhanced steam turbines) capture exhaust gases from the plant's combustion turbines and convert the heat energy in the exhaust stream into high-pressure and high-temperature steam. Hot exhaust gases from the combustion turbine are used to heat banks of tubes in the HRSG, and the heating of the water in the HRSG tube banks generates steam. The installation and use of HRSGs generates significant improvements in efficiency compared to a traditional, "simple cycle" combustion turbine power plant. As a result, the plant can produce more energy for a given heat input; because less fuel is utilized per kilowatt of power produced, emissions associated with power generation are reduced.

Midlothian Energy does not dispute that HRSG/steam turbine installations produce steam and allow the Midlothian Energy Plant to produce more electricity; however, to conclude that the HRSG/steam turbine installations are used "solely for production" is inaccurate. HRSGs produce energy from waste heat while significantly reducing air pollution from power generation on an emissions-per-heat-input basis. The fact that the HRSG/steam turbine installations reduce emission rates while generating power demonstrates that the HRSG/steam turbine installations are not "used, constructed, acquired or installed wholly to produce a good or provide a service." See 30 TAC § 17.6(1)(B) (emphasis added). By contrast, the Midlothian Energy HRSG/steam turbine installations reduce air pollution while also producing a marketable product.

3. Statutory and Regulatory Classification of HRSGs and Enhanced Steam Turbines

The ED's negative use determination for the Application is inconsistent with the current classification of HRSGs and enhanced steam turbines in both the Texas Tax Code and TCEQ rules. In the laws that established the TCEQ's Tax Relief for Pollution Control Property Program, the Texas Legislature recognized the air pollution control benefits of HRSGs when it included HRSGs and enhanced steam turbine systems in its "list of facilities, devices, or methods for the control of air, water or land pollution." See TEXAS TAX CODE § 11.31(k)(8)&(10) (emphasis added). Like the Tax Code, the Commission's own rules include HRSGs and

enhanced steam turbine systems on the 30 TAC § 17.17(b) Expedited Review List of “facilities, devices, or methods for the control of air, water and/or land pollution.” 30 TAC § 17.17(b) Expedited Review List, No. B-8. In stating that the HRSG/steam turbine installations “are used solely for production” in support of the negative use determination, the ED has taken a position that appears to contradict the treatment of HRSGs and enhanced steam turbine systems in Texas law and TCEQ rule. A piece of equipment that is on the “Expedited Review List” -- because its pollution control benefits are sufficiently well-established and the ED is not required to evaluate that aspect of the application as part of its technical review -- should not be subject to a negative use determination.

4. HRSGs Have Been Granted Previous Positive Use Determinations

Midlothian Energy’s surprise at the ED’s negative use determination for the Application is heightened by the fact that the ED’s determination represents a complete change in position with regard to HRSGs. As noted previously, a number of applicants submitted use determination applications under Chapter 17 for HRSGs in early 2008. In response to a number of those applications, the ED issued 100% positive use determinations for HRSGs that appear to be similar in design and function as the Midlothian Energy Plant HRSGs. *See, e.g.,* Positive Use Determination for Borger Energy Associates, LP (May 1, 2008) (“A 100% positive use determination for the two Heat Recovery Steam Generators. This equipment is considered to be pollution control equipment and was installed to meet or exceed federal or state regulations.”) (emphasis added); Positive Use Determination for Tenaska Gateway Partners Ltd. (May 1, 2008) (same); Positive Use Determination for Freeport Energy Center LP (May 1, 2008) (same). Copies of these Positive Use Determinations for HRSGs are included as **Exhibit B**.

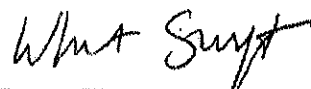
The fact that the ED has previously issued positive use determinations for HRSGs that operate in the same manner as the HRSGs at the Midlothian Energy Plant highlights the arbitrary nature of the ED’s negative use determination on Midlothian Energy’s Application. The ED’s July 10, 2012 negative use determination for the Midlothian Energy Plant HRSGs is inconsistent with the units’ statutory and regulatory classification, as well as past agency practice.

IV. Conclusion and Prayer

For these reasons, Midlothian Energy respectfully requests that the Commission overturn the ED's negative use determination on the Application and grant a positive use determination for the HRSG/steam turbine installations at the Midlothian Energy Plant.

Respectfully submitted,

BAKER BOTTS L.L.P.

By: 
Pamela M. Giblin
State Bar No. 07858000
Whitney L. Swift
State Bar No. 00797531
98 San Jacinto Blvd.
Suite 1500
Austin, Texas 78701-4039
Tel: 512.322.2500
Fax: 512.322.8339

ATTORNEYS FOR MIDLOTHIAN
ENERGY LIMITED PARTNERSHIP

Exhibit A

The Executive Director's Notice of Negative Use Determination

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 10, 2012

Mr. Greg Odell
Agent
Ryan, Inc.
12th Floor LB 72
13155 Noel Rd
Dallas, Texas 75240

Re: Notice of Negative Use Determination
Midlothian Energy Limited Partnership
Midlothian Energy
5000 V V Jones Rd
Venus (Ellis County)
Application Number: 12271; Tracking Number: 08-RC-MEL 2008

Dear Mr. Odell:

This letter responds to Midlothian Energy Limited Partnership's Application for Use Determination, received April 29, 2008, pursuant to the Texas Commission on Environmental Quality's (TCEQ) Tax Relief for Pollution Control Property Program for the Midlothian Energy.

The TCEQ has completed the review for application #12271 and has issued a Negative Use Determination for the property in accordance with Title 30 Texas Administrative Code (TAC) §17.4 and §17.6. Heat recovery steam generators and steam turbines are used solely for production; therefore, are not eligible for a positive use determination.

Please be advised that a Negative Use Determination may be appealed. The appeal must be filed with the TCEQ Chief Clerk within 20 days after the receipt of this letter in accordance with 30 TAC §17.25.

If you have questions regarding this letter or need further assistance, please contact Ronald Hatlett of the Tax Relief for Pollution Control Property Program by telephone at (512) 239-6348, by e-mail at ronald.hatlett@tceq.texas.gov, or write to the Texas Commission on Environmental Quality, Tax Relief for Pollution Control Property Program, MC-110, P.O. Box 13087, Austin, Texas 78711-3087.

Sincerely,

A handwritten signature in cursive script, appearing to read "Chance Goodin".

Chance Goodin, Team Leader
Stationary Source Programs
Air Quality Division

CG/RH

Mr. Greg Odell
Page 2
July 10, 2012

cc: Chief Appraiser, Ellis County Appraisal District, P. O. Box 878, Waxahachie, Texas 75165

Exhibit B

HRSG Positive Use Determinations

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

USE DETERMINATION

The Texas Commission on Environmental Quality has reviewed Use Determination Application, 07-11971, filed by:

BORGER ENERGY ASSOCIATES LP
BORGER ENERGY BLACKHAWK STATION
119 N. SPUR CO-GEN PLACE
BORGER TX 79008

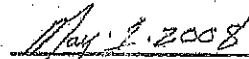
The pollution control property/project listed in the Use Determination Application is:

This facility has two thermally efficient heat recovery steam generators (HRSGs). This application is a Tier IV application seeking a partial use determination for the two HRSGs.

The outcome of the review is:

A 100% positive use determination for the two Heat Recovery Steam Generators. This equipment is considered to be pollution control equipment and was installed to meet or exceed federal or state regulations.


Executive Director


Date

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

USE DETERMINATION

The Texas Commission on Environmental Quality has reviewed Use Determination Application, 07-11914, filed by:

TENSKA GATEWAY PARTNERS LTD
TENASKA GATEWAY GENERATION STATION
SH 315, PO BOX 697
MOUNT ENTERPRISE TX 75681

The pollution control property/project listed in the Use Determination Application is:

This facility has three combustion turbine generators coupled with three thermally efficient heat recovery steam generators (HRSGs) and one enhanced steam turbine. This application is a Tier IV application seeking a partial use determination for the HRSGs and the enhanced steam turbines.

The outcome of the review is:

A 100% positive use determination for the three Heat Recovery Steam Generators. This equipment is considered to be pollution control equipment and was installed to meet or exceed federal or state regulations.

A negative determination is issued for the steam turbine. The use of the steam turbine does not provide an environmental benefit at the site. The steam turbine is not considered to be pollution control equipment.

A handwritten signature in dark ink, appearing to read "Glenn Shankle".

Executive Director

May 1, 2003
Date

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

USE DETERMINATION

The Texas Commission on Environmental Quality has reviewed Use Determination Application, 07-11994, filed by:

FREEPORT ENERGY CENTER LP
FREEPORT ENERGY CENTER LP
2301 N BRAZOSPORT BLVD
FREEPORT TX 77451

The pollution control property/project listed in the Use Determination Application is:

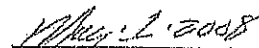
This facility has thermally efficient heat recovery steam generators (HRSGs) and steam turbines. This application is a Tier IV application seeking a partial use determination for the HRSGs and the enhanced steam turbines.

The outcome of the review is:

A 100% positive use determination for the Heat Recovery Steam Generators. This equipment is considered to be pollution control equipment and was installed to meet or exceed federal or state regulations.

A negative determination is issued for the steam turbines. The use of the steam turbines does not provide an environmental benefit at the site. The steam turbines are not considered to be pollution control equipment.


Executive Director


Date

BAKER BOTTS LLP

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Fax receipt will not be confirmed by phone unless requested

FROM Whit Swift
DATE August 2, 2012
PAGES 16

VOICE NO. 512.322.2672
FAX NO. 512.322.8339
RETURN TO ESG:Smith

TO Bridget Bohac
Texas Commission on Environmental Quality

FAX NO. 512.239.3311
VOICE NO. 512.239.3300

MESSAGE

Midlothian Energy Limited Partnership's Appeal of the Executive Director's Negative Use Determination

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ATTORNEY/EMPLOYEE NO. 03483

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